

# **WISCONSIN LEGISLATIVE COUNCIL STAFF**

## ***RULES CLEARINGHOUSE***

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## **CLEARINGHOUSE RULE 94-185**

### **Comments**

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]**

#### **1. Statutory Authority**

a. It is not possible, based on the information provided to comment on whether the department submitted the proposed rules to the auctioneer board for comment as required under s. 480.06 (1), Stats.

b. Section 480.08 (2) (d) and (3) (d), Stats., as created by 1993 Wisconsin Act 102, require that a registered auctioneer or registered auction company hold a current sales tax seller's permit issued by the Department of Revenue under s. 77.52 (9), Stats. Section RL 121.02 creates an exemption from this requirement based upon the applicant's own determination that the applicant is not required to have a seller's permit. What is the statutory authority for this exemption? If there are occasions when an auctioneer or an auction company is not eligible to obtain a seller's permit, the department should seek an amendment to the statutes.

#### **2. Form, Style and Placement in Administrative Code**

a. The rule does not appear to warrant seven separate chapters. Consideration should be given to reducing the number of chapters or, alternatively, to place the entire rule in one chapter with subchapters.

b. In s. RL 120.02 (1), it is suggested that the first sentence be subdivided into separate paragraphs and that the use of “where” be eliminated. The last sentence of the subsection should be placed in a note to the subsection.

c. In s. RL 120.02 (2), the word “his” should be replaced by the phrase “the seller’s” or by the phrase “his or her.”

d. In s. RL 121.02, the last sentence of sub. (1) is repeated in the last sentence of sub. (2).

e. In s. RL 121.03, “shall constitute” should be “constitutes.”

f. In s. RL 121.04 (1) (intro.), “provided that” should be changed to “if.” “Provided that” appears in several provisions of the rule.

g. The purpose of s. RL 121.04 (1) (a) 3 is unclear. Presumably, if such rules are established, the rules will be cross-referenced; until that occurs, it appears that sub. (3) is unnecessary. The introductory clauses of subs. (1) (a), (b) and (c) and (2) (a) and (b) state that the department “may” renew the credential under the circumstances set forth. Presumably, the department “shall” renew the credential under the stated circumstances unless s. RL 121.05 is invoked. The use of “may” should be revised accordingly. In addition, perhaps a better link can be made between ss. 121.04 and 121.05. Finally, in s. RL 121.04 (1) (b) (intro.) and (c) (intro.), renewals less than five years after expiration and renewals more than five years after expiration are considered; the rule does not account for a completed application for renewal of registration that is filed exactly five years after the date of termination. [See s. 440.08 (3) (b), Stats., as affected by 1993 Wisconsin Act 102, and the use of the phrase “within five years.”]

h. Section RL 121.06 is awkwardly drafted. It appears that the section could be redrafted along the following lines: “If the name of a registered auctioneer or auction company appearing on the current registration certificate changes, written notice of the name change shall be sent to the department within 30 days after the name change.”

i. Section RL 121.07 (1) should begin “In this section,”.

j. Section RL 122.02 references a form. [See s. 1.09 (2), Manual.]

k. Section RL 122.06 is excessively subdivided. In sub. (1), “must” should be “shall” and in sub. (6), “may” should be substituted for “shall be permitted to.”

l. In s. RL 122.08 (2), “passes” should be substituted for “has passed.”

m. It is suggested that subs. (1) and (2) of s. RL 123.03 be combined.

n. In s. RL 124.02, it is not clear why, in several places, reference is made to the “owner or consignor” of goods or real estate. See the definition of “consignor” in s. RL 120.02 (5).

o. Subsection (8) of s. RL 124.02 should be contained in the introductory clause of the section and, in the introduction, “must” should be “shall.” [See, also, sub. (4).]

p. In s. RL 125.02, the title should be in the singular and “As used” should be eliminated from the beginning of the section.

q. Sections RL 125.02 and 125.03 refer to personal property and real property. Why are the terms “goods” or “real estate” not used when they appear as the terms of choice in ch. 480, Stats., as created by 1993 Wisconsin Act 102?

r. It is suggested that s. RL 125.07 be included in s. RL 125.04. Within s. RL 125.07, it is suggested that subs. (1) and (3) be combined.

s. In s. RL 125.11, “which will enable” should be worded “that enables.”

#### **4. Adequacy of References to Related Statutes, Rules and Forms**

a. In s. RL 121.02 (1), it appears that the reference to s. 480.08 (2), Stats., should also include s. 480.08 (2m), Stats.

b. It is suggested that the introductory clause of s. RL 123.02 be redrafted as follows: “For purposes of s. 480.24 (2) (d), Stats., an advertisement is false, deceptive or misleading if it:”.

c. In s. RL 125.02, use of “unless the context otherwise specifically requires” is inadequate. The chapter is a short one and it should not be difficult to specifically cross-reference where the use of “trust funds” deviates from the defined term.

d. In s. RL 125.03, it appears that the correct cross-reference to the definition of the term “trust funds” is s. RL 18.02 (6).

e. The cross-reference in s. RL 125.03 to ch. RL 18 is inadequate. Chapter RL 18 is a detailed chapter primarily regulating trust accounts of real estate brokers and salespersons. The simple cross-reference contained in the rule to ch. RL 18 raises more questions than it resolves. The department should either be more specific about which provisions of ch. RL 18 apply to auctioneer or auction company trust funds relating to the conveyance of real property or promulgate specific provisions within ch. RL 125 that apply to such trust accounts.

#### **5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. Nowhere in the rule is there mention that the substantive provisions of 1993 Wisconsin Act 102 do not apply until March 1, 1995. Also, the effective date clause does not reflect that date. Clarification or explanation is in order. [See s. 480.02 (1), Stats., as created by 1993 Wisconsin Act 102.]

b. In s. RL 120.02 (2), second line, is the use of “and” after “bids” intended or should “or” be used?

c. In s. RL 121.04 (1) (b) 2, the department should consider modifying the word “criteria” by the word “registration.”

d. In s. RL 122.03 (intro.), it is suggested that the referenced examination be described. In addition, “that” should be substituted for “which.”

e. Section RL 122.04 provides that “future consideration of the applicant shall be at the discretion of the department.” This statement sets forth no standard by which the department will determine which applicants who have given or received unauthorized assistance during an

examination will receive additional consideration. Also, the word “received” should be replaced by the word “receives.”

f. Section 480.10 (4), Stats., as created by 1993 Wisconsin Act 102, requires that the department promulgate rules establishing standards for acceptable examination performance by an applicant for registration as an auctioneer. This has not yet been accomplished in s. RL 122.05, which simply states that the department will make some determination in the future as to an appropriate passing score. The passing score, when determined, should be placed in the Administrative Code. [See the definition of the term “rule” in s. 227.01 (13), Stats.]

g. In s. RL 122.06 (5), it is suggested that “by the applicant” follow “writing.” Subsection (6) should be clarified as to whether the limitation applies to each time an exam is taken or whether only one review is permitted, regardless of how many times the exam is taken.

h. Section RL 122.07 contains no reference to a procedure for resolving a claim of error. Compare s. RL 122.06 (5), which refers to a “hearing.”

i. In s. RL 123.02, it is suggested that the subsections terminate with semicolons rather than periods and that “or” follow sub. (3). It is suggested that sub. (3) be carefully reviewed by the department. As drafted, it can be read to apply to a subjective, but unreasonable, response on the part of the recipient of the advertisement. Furthermore, is “unjustified expectations” the appropriate term in this context?

j. In s. RL 124.02 (3), can “restrictions” be qualified to indicate in a general fashion to what the term refers?

k. In s. RL 124.02 (3) and (5), “or not” can be deleted.

l. Is it clear, under the provisions of ch. RL 125, that under s. 480.16, Stats., as created by 1993 Wisconsin Act 102, an exception to the general requirement that trust funds be deposited in a common trust account is that “the money may be paid to one of the parties pursuant to an agreement between the parties”?

m. The use of “an auctioneer acting as a sole proprietor or an auction company” in s. RL 125.08 and subsequent sections raises questions. The assumption appears to be that an auctioneer may only be organized as a sole proprietorship and an auction company may not be a sole proprietorship. Is that the case? See the definitions of “auction company,” “auction company representative” and “auctioneer” in s. 480.01, Stats.

n. Section RL 125.08 (2) should be reviewed to clarify whether the financial institution or the auctioneer or auction company must consent to the examination and audit of a trust account by the department.

o. Regarding the reference to s. 480.14 (3), Stats., in s. RL 125.09, the statutory provision cited does not require withdrawal of funds to reimburse the auctioneer or auction company for expenses incurred and commissions and fees earned.

p. Section RL 125.12 (1) requires that a computerized system “facilitate” compliance with all relevant requirements. Why should the department care whether the computerized system facilitates compliance as long as there is compliance under the system?

q. In s. RL 126.02 (2), does the department intend to reference a “rule” of any jurisdiction as well?

r. In s. RL 126.02 (3), more specificity may be in order. Is the subsection intended to apply only to adjudications of mental incompetence or is physical incompetence also included? Should there be a link to the ability to continue to perform professional services?

s. Section RL 126.02 (7) should be compared to the prohibited forms of discrimination contained in s. 111.321, Stats.

t. Should s. RL 126.02 (10) be revised to apply to intentionally or knowingly providing false information? Also, compare the use of “material misstatement” in s. 480.24 (2) (a), Stats., as created by 1993 Wisconsin Act 102.